

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW AHO,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY

The Honorable Beverly G. Grant

---

SUPPLEMENTAL BRIEF REGARDING PUBLIC TRIAL VIOLATION  
BY HOLDING FOR-CAUSE JUROR CHALLENGES AT SIDEBAR, AS  
AFFECTED BY STATE V. ANDERSON

---

OLIVER R. DAVIS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

## **TABLE OF CONTENTS**

A. <u>SUPPLEMENTAL ARGUMENT</u> .....	1
THIS COURT’S RECENT DECISION IN <u>STATE V. ANDERSON</u> MAKES CLEAR THAT TAKING FOR-CAUSE JUROR CHALLENGES AT SIDEBAR CONSTITUTES A “CLOSURE” REQUIRING THE TRIAL COURT TO FIRST APPLY THE <u>BONE-CLUB</u> FACTORS IN ORDER TO AVERT A VIOLATION OF THE RIGHTS TO A PUBLIC AND OPEN TRIAL UNDER THE SIXTH AMENDMENT AND THE STATE CONSTITUTION.....	1
1. <u>The trial court violated appellant’s constitutional right to a public trial by taking for-cause challenges to prospective jurors by an off-the-record sidebar conference.</u> .....	1
Closure of Proceedings. ....	3
Implication of Public Trial Right. ....	3
Justification for Closure. ....	5
2. <u>Reversal is required.</u> .....	5
B. <u>CONCLUSION</u> .....	5

## **TABLE OF CONTENTS**

### **CONSTITUTIONAL PROVISIONS**

U.S. Constitution, Sixth Amendment .....	2
Article I, section 22 .....	2
Article I, section 10 .....	2

### **COURT RULES**

CrR 6.4(d) .....	4
------------------	---

### **WASHINGTON DECISIONS**

<u>State v. Calvert Anderson</u> , COA No. 45497-1-II (May 19, 2015) ...	passim
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995) .....	1,2
<u>State v. Love</u> , 176 Wn. App. 911, 918, 309 P.3d 1209 (2013), <u>review granted in part</u> , 181 Wn.2d 1029 (2015) .....	4,5
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009). .....	5
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012). .....	2,3

### **UNITED STATES SUPREME COURT CASES**

<u>Presley v. Georgia</u> , 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010) .....	2
---	---

**A. SUPPLEMENTAL ARGUMENT RE: *STATE V. ANDERSON***

**THIS COURT’S RECENT DECISION IN STATE V. ANDERSON MAKES CLEAR THAT TAKING FOR-CAUSE JUROR CHALLENGES AT SIDEBAR CONSTITUTES A “CLOSURE” REQUIRING THE TRIAL COURT TO FIRST APPLY THE BONE-CLUB FACTORS IN ORDER TO AVERT A VIOLATION OF THE RIGHTS TO A PUBLIC AND OPEN TRIAL UNDER THE SIXTH AMENDMENT AND THE STATE CONSTITUTION.**

**1. The trial court violated appellant’s constitutional right to a public trial by taking for-cause challenges to prospective jurors by an off-the-record sidebar conference.**

In the present case, the trial court in Matthew Aho’s case did not analyze the factors of State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), before taking for-cause challenges to prospective jurors in a sidebar conference.

As set out in the Opening Brief, Respondent’s Brief, Supplemental Opening Brief on the public trial violation, and in the Reply Brief, Mr. Aho was sentenced to 210 months incarceration for complicity to burglary and for other related offenses. He appealed. CP 88. He argued, *inter alia*, that his right to a public trial [and his right to be present] was violated during the process of jury selection, including *voir dire* and related proceedings. Supplemental Brief of Appellant.

Surrounding the process of *voir dire* and jury selection at Mr. Aho’s trial, when it came time to exercise for-cause challenges, the court

conducted this process at a side-bar conference with counsel. 8/20/12RP at 102-03. The court did not consider the Bone-Club factors before conducting the challenge process away from public audibility. However, the Sixth Amendment and article I, section 22 guarantee the accused a public trial. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." There is a strong presumption courts must be open at all stages of the trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

This Court's recent decision in State v. Calvert Anderson, COA No. 45497-1-II (May 19, 2015), which addresses several significant aspects of the emerging public trial doctrine, makes clear that the process of taking for-cause challenges at side-bar was a violation of the foregoing rights, requiring reversal of all of Matthew Aho's convictions. State v. Anderson, Slip Op., at pp. 2-3.

The decision addresses and resolves in Mr. Aho's favor a number of arguments identical to those presented by the Respondent in its Brief of Respondent. Brief of Respondent, at pp. 59-69.

**Closure of Proceedings.** First, the, holding of the for-cause challenge process at side-bar did effectively close that proceeding to the public. Although the for-cause challenge proceeding was not held in the judge's chambers as the trial court initially suggested it would be, the holding of the proceeding at side-bar did impede public scrutiny. The members of the public in the gallery during Mr. Aho's trial could not hear what was being discussed at side-bar; indeed, this purpose -- the thwarting of public scrutiny -- is the very impetus for a side-bar discussion. The trial court effectively closed the proceeding to the public. State v. Anderson, Slip Op., at pp. 3-6.

**Implication of Public Trial Right.** Second, the proceeding in question implicates the public trial right. Although the Washington Supreme Court has not yet stated that for-cause juror challenges implicate the public trial right, the two-pronged "experience and logic" test of State v. Sublett requires a conclusion that the proceeding does implicate that right.

As to the first prong, because for-cause challenges have historically and traditionally been conducted in public, the "experience" prong of the Sublett test points toward a determination that the public trial right is implicated. State v. Anderson, Slip Op., at pp. 9-10; State v. Sublett, 176 Wn.2d at 73. It is true that for-cause challenges have not

been *required* to be held in public – but the traditional practice has been that they have been so conducted. State v. Anderson, Slip Op., at pp. 10-11; cf. State v. Love, 176 Wn. App. 911, 918, 309 P.3d 1209 (2013), review granted in part, 181 Wn.2d 1029 (2015) (holding that the “experience” prong of the Sublett test was not met because there was no showing that for-cause challenges had historically been *required* to be made in public).

As to the “logic” prong, it is apparent that public access plays a significant positive role in the functioning of the procedure at issue. This is despite the fact that the ultimate question of whether cause dismissal is warranted is often considered to be a legal question, and the same as being reserved for the court. See Love, 176 Wn. App. at 920 n. 7; but see CrR 6.4(d) (stating procedures for determining the applicable law “and the facts” pertinent to the court’s resolution of a for-cause challenge). Both the basic fairness of the criminal trial, and the appearance of fairness that is essential to public confidence in the criminal justice system, are furthered when the parties engaged in the process of making and responding to cause challenges, and the court when resolving such challenges, are subjected to public scrutiny and are aware of that scrutiny. State v. Anderson, Slip Op., at pp. 11-12.

**Justification for Closure.** The trial court did not offer any justifying reasons for holding the for-cause challenge process at side-bar. See 8/20/12RP at 102-03. Certainly, the trial court did not analyze the Bone-Club factors. Without that factor analysis, or some effective, alternative manner of balancing the public trial right against other compelling identified interests, there was no justification for holding the process at side-bar. See State v. Momah, 167 Wn.2d 140, 156, 217 P.3d 321 (2009).

**2. Reversal is required.** The trial court erred in holding the for-cause challenge process at side-bar, and reversal of Mr. Aho's convictions is required. State v. Anderson, Slip Op., at pp. 3, 14.

**B. CONCLUSION**

Based on the foregoing, this Court should reverse Matthew Aho's convictions.

DATED this 13<sup>th</sup> day of July, 2015.

Respectfully submitted,

s/ Oliver R. Davis  
OLIVER R. DAVIS  
WSBA No. 24560  
Washington Appellate Project  
Attorneys for Appellant



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 43932-8-II
v.	)	
	)	
MATTHEW AHO,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF JULY, 2015, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN WASANKARI, DPA	( )	U.S. MAIL
[PCpatcecf@co.pierce.wa.us]	( )	HAND DELIVERY
PIERCE COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA
930 TACOMA AVENUE S, ROOM 946		COA PORTAL
TACOMA, WA 98402-2171		

**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF JULY, 2015.



X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

# WASHINGTON APPELLATE PROJECT

**July 14, 2015 - 4:04 PM**

## Transmittal Letter

Document Uploaded: 5-439328-Supplemental Appellant's Brief.pdf

Case Name: STATE V. MATTHEW AHO

Court of Appeals Case Number: 43932-8

**Is this a Personal Restraint Petition?** ☐ Yes ☒ No

### The document being Filed is:

- ☐ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: \_\_\_\_\_
- ☐ Answer/Reply to Motion: \_\_\_\_\_
- ☒ Brief: Supplemental Appellant's
- ☐ Statement of Additional Authorities
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☐ Petition for Review (PRV)
- ☐ Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: [maria@washapp.org](mailto:maria@washapp.org)

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us